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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ZELENY,

Plaintiff,

vs.

GAVIN NEWSOM, *et al.*,

Defendants.

Case No. CV 17-7357 JCS

Assigned to:
The Honorable Richard G. Seeborg

Discovery Matters:
The Honorable Thomas S. Hixson

**DECLARATION OF DAVID
MARKEVITCH, ESQ. IN SUPPORT OF
MOTIONS TO CONTINUE CERTAIN
PRE-TRIAL DATES AND TO ADVANCE
HEARING AND SHORTEN TIME**

Action Filed: December 28, 2017
Trial Date: TBD

1 I, David Markevitch, declare:

2 1. I, as counsel at Affeld Grivakes LLP, am counsel of record to plaintiff Michael
3 Zeleny (“Plaintiff”) in this matter. I have personal knowledge of the facts below and could
4 testify competently to those facts if called upon to do so. I submit this declaration concurrently
5 with Plaintiff’s Motion to Continue Certain Pre-Trial Dates and Motion to Advance Hearing and
6 Shorten Time.

7 2. On June 19, 2020, the Parties stipulated to a modified pre-trial schedule due to the
8 COVID-19 pandemic and related business shutdowns, which prevented them from completing
9 discovery by the then-current deadline. Among other things, the Parties agreed to an Expert
10 Disclosure deadline of September 10, 2020. The Court approved that stipulation and schedule.
11 ECF No. 134. Based on subsequent developments, including the resurgence of the pandemic
12 and continued business closures across the state, the schedule agreed upon in June appears to
13 have been overly optimistic.

14 3. The Parties have completed substantially all discovery, but because of the
15 resurgence of the pandemic, have been unable to complete a necessary deposition and have a
16 small number of remaining discovery issues, as follows:

17 a. *First*, our office has been unable to serve with a subpoena and depose Mr.
18 Ivan Toews, the final percipient witness previously employed by the City of Menlo Park to be
19 deposed. Our office retained a private investigator to locate Mr. Toews and attempted service at
20 all potential locations including his current place of employment. I reached out to Mr. Toews
21 directly at all known telephone numbers, spoke to Mr. Toews’ sister-in-law in person and left
22 my contact information with her on representation that she would pass it to Mr. Toews’ spouse,
23 in hopes of securing Mr. Toews’ agreement to appear for a deposition. Unfortunately, all
24 attempts have been unsuccessful to date. We have been advised by Mr. Toews’ employer that
25 Mr. Toews is not currently working from the office. Based on Mr. Toews’ unwillingness to
26 respond to my attempts to contact him, I understand that he does not wish to be found and served
27 with a subpoena. I, however, reasonably expect that further (and final) attempts can and should
28 be made and may result in service of a subpoena on Mr. Toews.

1 b. *Second*, the deposition of Chief Dave Bertini, individually and as the
2 30(b)(6) representative of the City of Menlo Park, was postponed several times due to COVID-
3 19. The deposition took place remotely (via Zoom) on August 7, 2020, a date proposed by Chief
4 Bertini and the City of Menlo Park. The transcript of Chief Bertini's deposition has not yet been
5 completed but we anticipate it shortly.

6 c. *Third*, I recently filed a joint discovery motion regarding certain
7 interrogatory responses from Attorney General Xavier Becerra. Consistent with Judge Hixson's
8 practice, I anticipate a prompt ruling on this motion.

9 4. As a result of these outstanding discovery matters, our office is not able to provide
10 complete expert disclosure by September 10, 2020. Among other things, Chief Bertini's
11 testimony is essential to expert analysis. Similarly, counsel for the City of Menlo Park has
12 expressed to me his reservations about the City's ability to fully assess the need for any rebuttal
13 experts without all fact depositions, including of Mr. Toews, having been completed first.

14 5. Finally, the defendants have requested a corresponding continuance of the
15 deadline for hearings on any dispositive motions, as the parties reasonably need all discovery
16 completed before such motions can be filed efficiently and meaningfully. We agreed to make
17 this a slightly longer extension to avoid interference with holiday plans.

18 6. Although our office anticipates completing these matters more quickly, we have
19 agreed to an extension of 30 days in an abundance of caution and to avoid having to return to the
20 Court again to request additional time.

21 7. I met and conferred with counsel for defendants regarding the matters set forth in
22 this declaration and the accompanying motions. Our discussions, through correspondence and a
23 telephone conference, included a timetable to accommodate the parties' discovery and
24 dispositive motion needs and obligations. Through these discussions, we agreed to the schedule
25 set out in the accompanying motions, which appears to be the minimum modification necessary
26 to accommodate all parties.

[SIGNATURE ON THE FOLLOWING PAGE]

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct.

3 Executed on this 31st day of August 2020.

4 s/ David Markevitch
5 David Markevitch
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PROOF OF SERVICE

2 I hereby certify that on August 31, 2020, I electronically filed the foregoing document
3 using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will
send a notice of electronic filing to the interested parties.

4 | Dated: August 31, 2020

s/ David Markevitch
David Markevitch